

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE ANDREW GRAY, JR.,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249135
Kent Circuit Court
LC No. 02-007766-FH

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of felon in possession of a firearm, MCL 750.224f, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of felonious assault, MCL 750.82, felon in possession of a firearm, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with an altercation that took place after several persons gathered in anticipation of a fight. Shots were fired during the incident. Three prosecution witnesses, including a woman who was not involved in the altercation in any way, testified that defendant fired the gun, while defendant and three defense witnesses testified that he did not possess a gun during the altercation. The jury acquitted defendant of felonious assault and felony-firearm, but convicted him of felon in possession of a firearm.

On appeal, defendant argues the prosecution's failure to produce Shanika Threats, a res gestae witness listed on the information, at trial denied him due process. He also asserts that defense counsel's failure to take steps to ensure that Threats testified at trial or to move for an evidentiary hearing or a new trial denied him the effective assistance of counsel. We disagree and affirm.

A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). A prosecutor must list the names of known res gestae witnesses on the information. *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). MCL 767.40a. If a prosecutor endorses a witness, he must exercise due diligence to produce the witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d

76 (2004). A prosecutor may be relieved of this duty by showing that the witness could not be produced notwithstanding the exercise of due diligence. *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant did not object to the prosecution's failure to produce Threats at trial, and did not move for an evidentiary hearing or a new trial. Therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Defendant's claim that Threats' testimony that he did not have a gun would have convinced the jury to acquit him of all charges is based on speculation. The jury would have been entitled to reject Threats' testimony. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). No plain error occurred. *Carines, supra; Eccles, supra.*

The failure to call a witness constitutes ineffective assistance only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). Defendant and other defense witnesses testified that he did not possess a gun during the incident. Counsel's failure to call Threats did not deprive defendant of a substantial defense, and likely constituted trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Counsel's performance did not result in prejudice. *Carbin, supra.*

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski